

EXHIBIT 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

-----:
REYNOLDS CONSUMER PRODUCTS INC., :
Plaintiff, :
:-----:
-vs- : Case No. 1:13-cv-214
:-----:
HANDI-FOIL CORPORATION, :
Defendant. :
:-----:

V O L U M E 1 (a.m.)

TRIAL PROCEEDINGS

March 24, 2014

Before: Liam O'Grady, USDC Judge

And a Jury

APPEARANCES:

John G. Froemming, Jessica D. Bradley, and Daniel H. Shulman,
Counsel for the Plaintiff

David K. Callahan and Robin A. McCue,
Counsel for the Defendant

INDEX

OPENING STATEMENTS BY:

MR. FROEMMING

56

WITNESS

EXAMINATION

PAGE

CLOSING ARGUMENTS BY:

COURT'S JURY INSTRUCTIONS

1 | P R O C E S S I N G S

2 THE CLERK: Civil Action 1:13cv214, Reynolds Consumer
3 Products Inc. v. Handi-Foil Corporation. Will counsel please
4 identify themselves for the record.

5 MR. FROEMMING: Good morning, Your Honor. John
6 Froemming and Jessica Bradley, Jones Day, counsel for the
7 plaintiff.

8 THE COURT: All right, good morning. Good morning.

9 MR. CALLAHAN: Good morning, Your Honor. David
10 Callahan and Robin McCue from Kirkland & Ellis for the
11 defendant, Handi-Foil. With us at counsel table, Mr. Peter
12 Perkins. He's Handi-Foil's CFO.

13 THE COURT: All right, good morning to you, sir.
14 Good morning to each of you.

15 All right, so I take it we don't need the services of
16 Judge Jones this morning?

17 MR. CALLAHAN: We did talk, Mr. Froemming and I did
18 talk over the weekend. I think not today, Your Honor. Thanks.

19 THE COURT: All right, we'll let him know that he's
20 not needed right now, and I'm not sure what his availability is
21 afterwards, but if need be, we'll check.

22 There's a number of corporations that you asked that
23 I identify in voir dire, including, you know, several Reynolds
24 groups, but also Beverage Packaging Holdings, Columbia
25 University, Davis & Hosfield Consulting, NERA -- I guess these

J.D. Mickle - Cross

173

1 whatever it is and say, we've got exactly Reynolds blue, right?

2 A. Right.

3 Q. Okay. And similarly, you've got this Reynolds pink?

4 A. Yes.

5 Q. And you use that always, all the time, consistently the
6 same way, it looks like that has gone back 50 years, right?

7 A. Yes. That's a PMS 486, it's slightly darker than PMS 486.

8 Q. Okay. So, you take PMS 486 which is something I could
9 look up in a color guide, you make that just a little bit
10 darker, and you use it that way every single time, right?

11 A. Right.

12 Q. When you originally started, you had three straight lines,
13 then you went to these curved silver lines to separate the
14 reflex blue from the pink, correct?

15 A. Yes, sir.

16 Q. And you always do that exactly the same way, correct?

17 A. Yes.

18 Q. Because you want consumers to know that when they see
19 Reynolds, reflex blue, three curved silver stripes, and pink,
20 this is Reynolds, right?

21 A. All together it works as the carton trade dress.

22 Q. All of those elements together?

23 A. Right.

24 Q. The Reynolds name, the particular shade of reflex blue,
25 the particular shade of PMS pink, and the three silver stripes,

J.D. Mickle - Cross

174

1 right?

2 A. That's right.

3 Q. That's Reynolds' brand equity, correct?

4 A. This is Reynolds trade dress, yes.

5 Q. Right. So, can we agree -- I am going to show you -- let
6 me just -- I am going to ask that you get exhibits, Defendant's
7 Exhibit 248, 256 and 252. Thank you very much.

8 Those are the Handi-Foil boxes, three of the
9 Handi-Foil boxes that are at issue in this case.

10 Now, do you know -- well, let's start with the easy
11 one. You said one of the four parts of Reynolds brand equity
12 is the Reynolds name or the Reynolds Wrap name, right?

13 A. Right.

14 Q. You would agree with me that none of the three Handi-Foil
15 boxes that you have got in front of you have got the Reynolds
16 name on them, right?

17 A. That's right.

18 Q. Do you know whether the three Handi-Foil boxes use that
19 particular shade of reflex blue that Reynolds uses?

20 A. I don't know that for sure.

21 Q. You can't tell?

22 A. It's very similar.

23 Q. But you don't know if it's that particular shade of reflex
24 blue?

25 A. No, no, but it is very similar.

J.D. Mickle - Cross

175

1 Q. You would agree with me that none of the three Handi-Foil
2 boxes that are at issue in this case in front of you have got
3 three silver stripes on them, correct?

4 A. That's correct.

5 Q. In fact, they don't have three stripes of any color on
6 them, right?

7 A. This one has a stripe.

8 Q. That's got a one single white stripe, right?

9 A. Right, but you said none of them have, and it does have a
10 stripe.

11 Q. And let me just make sure my question was clear, I'm
12 sorry.

13 None of the boxes have three stripes?

14 A. No.

15 Q. Whether they are silver or any other color, right?

16 A. No.

17 Q. And you would agree with me that none of the Handi-Foil
18 boxes that you've got up on the stand use the color pink, is
19 that right?

20 A. No, that's not pink.

21 Q. Okay. So, of the four things that you said -- I just want
22 to see if we've got the list right. Of the four things that
23 you said constitute the Reynolds brand equity, you agree with
24 me, don't you, that the three boxes that you've got on the
25 stand up in front of you, don't have three of them and you are

J.D. Mickle - Cross

176

1 not sure about the fourth, right?

2 A. Not literally, no.

3 Q. Pardon me?

4 A. They do not literally have those on there.

5 Q. So, the Handi-Foil boxes do not literally have three of
6 the four elements that you described as being the Reynolds
7 brand equity, and you're not sure about the fourth, right?

8 A. Yes.

9 Q. Okay. Let's go back and talk about those trademarks
10 because I may have misspoken in my opening statement, I am not
11 sure if I did or not.

12 But it is accurate that the color reflex blue is not
13 listed in the trademark, right?

14 A. No.

15 Q. The trademark registrations?

16 A. No, it's not.

17 Q. One of those track registrations has the Reynolds name on
18 it, right?

19 A. Yes.

20 Q. Both of the trademark registrations call for the color
21 pink, correct?

22 A. What it says -- what it says in that, the line drawings
23 indicate the color placement by horizontal, diagonal, and
24 vertical lines, and call out the colors.

25 Q. And the color that they call out for this, as you look it,

J.D. Mickle - Cross

177

1 the right-hand section of the box, is pink, right?

2 A. Yes, it's called pink.

3 Q. And it calls out three actually straight stripes, right,
4 in the trademark registration?

5 A. It shows three stripes, right.

6 Q. And they call those out as being silver?

7 A. Yes.

8 Q. Okay. So, for the trademark, the two trademarks at issue,
9 you would agree with me that none of the Handi-Foil boxes in
10 front of you have the name Reynolds on them, right, as one of
11 the trademarks does?

12 A. None of them have the word "Reynolds" on them, except --

13 Q. None of them --

14 A. Except under your Handi-Foil logo it says: Compare to
15 Reynolds Wrap.

16 Q. Now, you are aware, aren't that you, that Mr. Bryla has
17 testified in this case, he gave a deposition in this case, he
18 testified that that is actually a thing that distinguishes
19 Handi-Foil from Reynolds Wrap, right?

20 A. I haven't heard Mr. Bryla's testimony.

21 Q. Well, you would agree with that, wouldn't you? That is a
22 distinction?

23 A. Say that again.

24 Q. So, in other words, you would never put "compare to
25 Reynolds Wrap" on a box of Reynolds Wrap, right?

J.D. Mickle - Cross

178

1 A. No.

2 Q. That would be silly?

3 A. No.

4 Q. You would put "compare to Reynolds Wrap" on something that
5 isn't Reynolds Wrap, right?

6 A. Not necessarily.

7 Q. Okay. Well, there's only -- I think there's only two
8 different ways to do this. Either you would or wouldn't put --

9 A. I'm sorry, say this again. Ask the question again.

10 Q. Yeah. So, you agree with me that you would never put
11 "compare to Reynolds Wrap" on something that was Reynolds Wrap,
12 right?

13 A. No.

14 Q. That would be silly? It just wouldn't make sense, right?

15 A. No.

16 Q. So, the only thing that it makes sense to put "compare to
17 Reynolds Wrap" on is something that isn't Reynolds Wrap, right?

18 A. Yes.

19 Q. Yes?

20 A. And why would they do that?

21 Q. Well, because it's not Reynolds Wrap, right?

22 A. I guess what -- I guess what I'm confused about is that a
23 carton that looks so much like the Reynolds Wrap product that
24 has the word "Reynolds Wrap" on it, seems very, very -- it
25 seems likely that there could be some confusion in terms of

J.D. Mickle - Cross

179

1 what the consumer is really reading there.

2 Q. Okay. So, in your opinion, Mr. Mickle, a carton that
3 doesn't have three of the four elements of what you described
4 as Reynolds' trade dress, you are not sure about the fourth,
5 and says something on it that would never be on a Reynolds Wrap
6 box, might still cause some likelihood of confusion, is that
7 your position?

8 A. Well, there is one point I think that we need to make, is
9 that when you're saying --

10 Q. Well, again I --

11 A. When you're saying --

12 THE COURT: Hold, hold. Whoa, you can't both talk at
13 one time or we can't get the record correct.

14 THE WITNESS: I'm sorry.

15 THE COURT: So, you listen to the question.

16 THE WITNESS: Okay.

17 THE COURT: And you answer the question that you're
18 asked.

19 THE WITNESS: Okay.

20 THE COURT: And if your counsel wants to try and
21 bring something back up, he'll have the opportunity to do that.

22 THE WITNESS: I'm sorry. I'm sorry.

23 BY MR. CALLAHAN: (Continuing)

24 Q. So the question is, the three boxes up there that you
25 admit don't have three of the four elements of the Reynolds

J.D. Mickle - Cross

180

1 brand equity, you're not sure about the fourth, and two of the
2 boxes say something -- or all the boxes say something that
3 you'd never put on a package of Reynolds Wrap, you still think,
4 is it correct, that those boxes might cause some likelihood of
5 confusion?

6 A. I do.

7 Q. With real consumers?

8 A. I do.

9 Q. But you haven't seen any actual consumer who was in fact
10 confused, have you?

11 A. No, I have not.

12 Q. Okay. Now, the bars, these three stripes, these three
13 curved stripes --

14 A. Yes, sir.

15 Q. -- are a pretty important sort of individual part of
16 Reynolds' brand equity, aren't they?

17 A. Pretty important may be an overstatement.

18 Q. Okay. Are they important enough that Reynolds has given
19 these three curved lines their own name?

20 A. Well, for defining the carton that was being tested, the
21 label of arc was put on that one. And then there was another
22 one tested that had its own label. It was so that we could
23 identify them. And it's just stayed.

24 Q. So, these three lines are at least important enough that
25 Reynolds has given them their own name, and it calls it the

S. Butler - Cross

443

1 Q. Now, in designing your protocol in the case, you did rely
2 on Reynolds' lawyers to provide you with certain information,
3 right?

4 A. That's correct.

5 Q. You discussed the proper population of people to survey
6 with Reynolds' lawyers, right?

7 A. Yes.

8 Q. And Reynolds' lawyers gave you information about who the
9 purchasers of Reynolds' products might be, correct?

10 A. Of Reynolds' products and of aluminum foil more generally,
11 yes.

12 Q. Reynolds' counsel gave you information about the markets
13 in which Handi-Foil was being sold, right?

14 A. Yes.

15 Q. And they provided you with samples of the boxes that are
16 at issue in this case so you could look at them, right?

17 A. I believe I had samples, yes.

18 Q. Well, you must have had at least pictures?

19 A. I certainly had pictures. I'm trying to remember at what
20 point I actually had the real boxes.

21 Q. But it was always the lawyers that were the
22 intermediaries, right? You never spoke directly to anyone at
23 Reynolds about this, is that right?

24 A. That's correct.

25 Q. Now, let's take a look again at Exhibit 40, Defendant's

S. Butler - Cross

444

1 Exhibit 40. This is what we call the Dollar Tree box, right?

2 Is that right?

3 A. Yes. Sorry. Yes.

4 Q. And you understand that Exhibit 40, the Dollar Tree box,
5 was only ever sold in Dollar Tree stores, right?

6 A. That's my understanding, yes.

7 Q. Dollar Tree is the only place consumers could ever come
8 across the Dollar Tree box, right?

9 A. Yes.

10 Q. But at the time you did this survey, you were not aware
11 that Exhibit 40, the Dollar Tree box, wasn't also -- or wasn't
12 available in grocery stores? You weren't aware of that, right?

13 A. At the time that I did the survey it was my belief that
14 that box was in other locations beyond the Dollar Tree, yeah.

15 Q. So from your conversations with Reynolds' lawyers, you
16 came to conclude that the Dollar Tree box, which we know is
17 only ever available in Dollar Tree, was actually available in
18 Dollar Tree and other grocery and retail outlets, right?

19 A. That's correct.

20 Q. And is it accurate that -- I think while you said you did
21 look at pictures of the boxes that are at issue in this case,
22 is it accurate that you had not looked at the actual packages
23 themselves, physical samples, during the development of your
24 survey or in preparing your report?

25 A. I guess you have to be more specific about which packages.

S. Butler - Cross

445

1 I looked at a number of packages --

2 Q. Let's talk about the two that are available in grocery,
3 and those would be Defendant's Exhibits 256 and 250.

4 A. That's correct. I did not have those packages at the
5 time, the actual packages at the time I designed the survey.

6 Q. In fact, refresh my recollection if I'm wrong, but my
7 recollection is I was the first person ever to show you actual
8 samples of the two products that Reynolds sells -- or that
9 Handi-Foil sells in grocery stores, right?

10 A. In my deposition, that's correct, yes.

11 Q. Okay. Now one of the things -- and maybe -- well, I think
12 you've seen these before, but if you need to look at them, just
13 let them know and I'll ask them to be got to you.

14 One of the things you weren't aware when you designed
15 your survey is that both of the grocery packages have got
16 disclaimers on the box itself, right?

17 A. That's correct.

18 Q. So, you were not aware when you designed your survey,
19 Reynolds didn't tell you that both of the grocery store
20 packages say Reynolds Wrap is the registered trademark of
21 Reynolds Consumer Products Company. This product is neither
22 manufactured nor made under the authorization of Reynolds
23 Consumer Products Company.

24 You didn't know these two boxes said that, did you?

25 A. I was not aware of that when I designed my survey, that's

S. Butler - Cross

446

1 correct.

2 Q. And that is not information that Reynolds' lawyers
3 provided to you, right?

4 A. Not at the time I designed the survey, that's correct.

5 Q. Okay. Let's talk about the Reynolds package that you
6 surveyed. It is Defendant's Exhibit 41, is that correct?

7 A. Yes.

8 Q. And the Reynolds Wrap package that you surveyed is, as
9 this is, 30 square feet, correct?

10 A. That's correct.

11 Q. And you are aware now that the Reynolds product that was
12 sold at Dollar Tree in -- where Handi-Foil's Dollar Tree
13 package is sold, was not a 30-foot, 30-square foot product,
14 right?

15 A. Yes. It's my understanding now that the Reynolds package
16 is no longer sold at Dollar Tree at all.

17 Q. Okay. When you did your survey, it was being sold at
18 Dollar Tree?

19 A. That's correct.

20 Q. But what was being sold at Dollar Tree when you did your
21 survey was not the 30-square foot box, it was a different size
22 box, right?

23 A. Right. But I was aware at the time that I did my survey
24 that that Reynolds package was going to be phased out of Dollar
25 Tree.

S. Butler - Cross

447

1 Q. And you were also -- but you weren't aware that what was
2 actually being sold was like an 18.75-square foot roll? Or do
3 you still not know that?

4 A. No, I am aware of that now. I may have been aware of that
5 at the time and understood that that package was no longer
6 going to exist in Dollar Tree.

7 Q. Okay. Now, Ms. Butler, you talked about some of the work
8 you did in the Apple case where it sounds like you sort of were
9 helping people sift through all this expert stuff that other
10 people were doing, is that right?

11 A. I was helping Apple's counsel, yes, review all of the
12 surveys that were submitted, including helping them design
13 their own, and also evaluate the other surveys turned in by the
14 other side.

15 Q. And about how long did that take you? Months and months?

16 A. I believe so. Yeah, it certainly was like three months
17 probably.

18 Q. Three months or so to sort of get yourself the
19 understanding that you need to be able to look at all the
20 different stuff and help them create a survey that was
21 appropriate?

22 A. Well, again, there were multiple surveys, both from
23 Apple's side that were designed and from the other side. So --
24 and things came in at staggered times.

25 Q. Okay. In this case, Reynolds' attorneys got ahold of

S. Butler - Cross

448

1 June 26 of last year, right?

2 A. That sounds about right, yes.

3 Q. And I'll include the 4th of July weekend. But in about 16
4 days later you had issued an expert witness report, is that
5 right?

6 A. That's correct.

7 Q. Every single thing that you did that went into your expert
8 report, all the research, all the talking to Reynolds' lawyers,
9 all the designing the survey, and getting it out to the field,
10 and all of that other stuff took place in 16 days?

11 A. That's correct.

12 Q. You would agree with me that that is on the shorter end of
13 time that you normally have to do the work that is required to
14 do an appropriate and well-put-together survey, right?

15 A. Right. And I think as you and I probably discussed in my
16 deposition, you know, if I have more time, I would always love
17 to have more time. But that was the time I had.

18 Q. Now, it's compounded to some extent by the fact that is
19 the first time that you have ever served as a testifying expert
20 in a trade dress survey case, correct?

21 A. Well, the testifying part really comes after the design
22 and after the report. So, certainly I have designed surveys
23 like this before. I have certainly helped put them into the
24 field. Certainly analyzed data from them. I have been hired
25 as a testifying expert before in matters very similar to this

1 S. Butler - Cross

449

1 one in the sense that it involved trade dress packaging.

2 It's just, I think as I articulated this morning, not
3 all of them turn out to the client's liking.

4 Q. So, let me just ask that question again.

5 A. Sure.

6 Q. I would just like you to focus on what my question is.

7 Which is, isn't this the first time -- wasn't today the first
8 time you've taken the stand as the person who designed a trade
9 dress survey and served as a testifying expert?

10 A. This is the first time I have testified to a trade dress
11 survey, yes.

12 Q. You've worked for other people at NERA before and sort of
13 been the number two or something like that, but this is the
14 first time where it's your survey, you designed it in 16 days
15 and put it together and got it all done, and you are actually
16 the one testifying about it?

17 A. I am -- this is the first time I am testifying to a trade
18 dress survey, yes.

19 Q. Now, let's go back to how we put this survey together.
20 One of the first and most important things you do in putting a
21 survey together is defining the relevant population, right?

22 A. That's correct.

23 Q. Give us the easiest possible example. If we are doing a
24 survey that has to do with aluminum foil, we wouldn't survey
25 people who never buy aluminum foil?

S. Butler - Cross

450

1 A. That's correct.

2 Q. That's the easiest example of a place where, whoops,
3 picked the wrong group of people. I want know about aluminum
4 foil, but none of or some of the people that I surveyed don't
5 know anything about aluminum foil and don't buy it themselves?

6 A. That's right.

7 Q. So, you would agree with me that in your field -- and when
8 people are doing surveys like this that sit around and talk
9 about what's important, one of the things that they think is
10 very important, some people call it a key element, is
11 identification of the proper universe to survey?

12 A. The population of the universe, yes.

13 Q. And that's because if you get the wrong population, then
14 you might be surveying people whose opinions just aren't
15 relevant, right?

16 A. That's correct.

17 Q. Again now, the box that you surveyed, the Dollar Tree box,
18 the only -- the universe of people who would only ever see this
19 is somebody who went into a Dollar Tree, right?

20 A. Unless they saw it at somebody else's house. But, yes, I
21 mean, where they would purchase it is a Dollar Tree, that's
22 correct.

23 Q. So, if the person that we're looking at hasn't ever been
24 into a Dollar Tree, or we don't know they have been into a
25 Dollar Tree, they never could have come across the product that

S. Butler - Cross

451

1 you're doing the survey on, right?

2 A. For that exact specific product, that's correct.

3 Q. Okay. And you would agree with me that there might be a
4 difference in a consumer's understanding between somebody who
5 sees a package when they go to the Dollar Tree store and
6 somebody who has never seen it, right?

7 A. It's possible. It's also likely that there are no
8 differences.

9 Q. But you don't know that, do you?

10 A. No, I don't know.

11 Q. In fact, you don't have any evidence of whether or to what
12 extent the people that you surveyed, these 400 folks that you
13 surveyed, ever shopped at a Dollar Tree?

14 A. No, that's not correct.

15 Q. Do you have any evidence of whether, and if so, the extent
16 to which the people you surveyed shop in Dollar Tree? Do you
17 have any information about that at all?

18 A. Well, certainly there are a number of respondents in my
19 survey, at least one or two, that indicate they have seen the
20 packages before in a Dollar Tree.

21 Q. Let me ask you to take a look at your deposition, Ms.
22 Butler. You recall being deposed in this case?

23 A. Yes.

24 Q. It's in your binder. What's that? Oh, it's not. I'm
25 sorry.

S. Butler - Cross

452

1 Could you hand Ms. Butler a copy of her deposition.

2 There you go.

3 A. Thank you.

4 Q. We will be at 78, lines 15 through 19.

5 If you would take a look at page 78, Ms. Butler,
6 lines 15 through 19. You recall giving a deposition in this
7 case, right?

8 A. That's correct.

9 Q. And you were placed under oath just as you are here in
10 court?

11 A. That's correct.

12 Q. And affirmed that you would tell the truth at your
13 deposition?

14 A. Yes.

15 Q. I asked you a bunch of questions, you gave a bunch of
16 answers, right?

17 A. Yes.

18 Q. And isn't it true that you said -- I asked you the
19 following question at your deposition, page 78, lines 15
20 through 19. And you gave the following answer.

21 Question: Do you have any evidence that -- do you
22 have any evidence of whether, and if so, the extent to which
23 the people you surveyed shop in Dollar Tree? Do you have any
24 information about that at all? Answer: No.

25 Was that the question I asked and was that the answer

S. Butler - Cross

453

1 you gave under oath?

2 A. Yes.

3 Q. Now, you would agree with me -- now let's just move on.

4 Okay. All right.

5 Let's talk about whether the people who participated
6 in your survey, which was designed to figure out what people
7 encountering the Handi-Foil product in a Dollar Tree store, how
8 they would react to it, right?

9 A. Well, the survey was designed to evaluate whether
10 Handi-Foil's use of the trade dress elements at issue would
11 cause confusion. That box is one example of the way in which
12 Handi-Foil uses the trade dress elements.

13 Q. And it's the only -- it's the only box you surveyed? It's
14 the only Handi-Foil box you surveyed?

15 A. That's correct.

16 Q. So your survey was focussed on a box only available at
17 Dollar Tree, right?

18 A. That's the box that was used, yes.

19 Q. And we know that the Reynolds box that you used was never
20 sold at Dollar Tree, right?

21 A. Again, it was my understanding at the time I did the
22 survey that Reynolds was no longer going to be sold in Dollar
23 Tree, so --

24 Q. But Reynolds had been in Dollar Tree?

25 A. Yes.

S. Butler - Cross

454

1 Q. And when you did your survey, they were in Dollar Tree?

2 A. I believe so, yes.

3 Q. And my point is just, you chose a box that at no time ever
4 was ever sold by Reynolds in Dollar Tree, right?

5 A. That's correct.

6 Q. So, no consumer ever walking into Dollar Tree would ever
7 have seen the Reynolds and the Handi-Foil packages side to
8 side, is that right?

9 A. They weren't shown in the survey side to side like that
10 either. But, yes, that's correct.

11 Q. Nobody would ever first see the Reynolds 30 foot in the
12 Dollar Tree and then later see the Handi-Foil product in the
13 Dollar Tree, would they?

14 A. That's correct.

15 Q. And there were some other boxes that you used -- Kentaro,
16 if you could pull up 271, please. This is demonstrative
17 Exhibit 271. Can you pull up the first product there.

18 So, the first one is Handi-Foil 25 foot. And that is
19 sold at Dollar Tree, right?

20 A. Yes.

21 Q. The second product is the Reynolds 30 square foot, and we
22 just determined that's not sold at Dollar Tree, right?

23 A. That's correct.

24 Q. Okay. The third product is the CVS Total Home. CVS is
25 not available at Dollar Tree, correct?

S. Butler - Cross

455

1 A. That's correct.

2 Q. The next product is the Shopper's Value 25-square foot
3 product. Is that sold in Dollar Tree?

4 A. No.

5 Q. All right. And then the last product you showed people is
6 the Ultra Foil 40-square foot package. That actually is sold
7 in Dollar Tree, right?

8 A. That's correct.

9 Q. So of the packages that you showed consumers in your
10 survey, three of the five were never available in Dollar Tree
11 stores?

12 A. That's correct.

13 Q. All right. Another -- you can take that down, Kentaro.
14 Thank you.

15 Another key area of survey design that requires very
16 careful attention by you is the control, right?

17 A. That's correct.

18 Q. This is how you get to what you call net confusion, right?

19 A. That's correct.

20 Q. You take the number of people that you say were confused
21 by the box that's at issue, in this case the Handi-Foil box,
22 you see how many people are confused by the other box, and you
23 subtract the control box from the Handi-Foil box, right?

24 A. That's correct.

25 Q. So you've got to do the control correctly or you're going

1 S. Butler - Cross

472

1 overanalysis to say this person thinks that all aluminum foil
2 has got a similar origin?

3 A. Well, they are naming the two packages. But, yes, they
4 seem to say that every -- or they are all foil, yes.

5 Q. And you counted them as being confused as well, right?

6 A. That's correct.

7 Q. Let's set that aside. Now let's talk about the two
8 grocery boxes that you did not survey. Right?

9 A. Yes.

10 Q. These are two not available in Dollar Tree, never
11 available in Dollar Tree. Your understanding now is that these
12 were or are sold in grocery outlets, right?

13 A. That's my understanding, yes.

14 Q. You didn't survey either of the two grocery boxes,
15 correct?

16 A. That's correct.

17 Q. But nonetheless, I believe it is your opinion that the
18 survey results that you did do, the box you did use would not
19 be any different -- they would apply with equal force to the
20 two grocery boxes, right?

21 A. I think, as I have testified, that the boxes are
22 substantially similar. And I would expect the results to be
23 substantially similar.

24 Q. And that's not just sort of gut feel on your part? I
25 mean, you told me that you feel you've a scientific basis for

1 S. Butler - Cross

473

2 saying the results wouldn't be any different? That consumers
3 would be similarly confused by any of the grocery packages,
4 isn't that right?

5 A. I think I indicated that I thought that was likely, yes.

6 Q. And your scientific basis for concluding that the results
7 wouldn't be any different is because the boxes share, in your
8 view, a lot of the same elements that Reynolds claims are
9 infringing?

10 A. They share many of the similar elements to the box I
11 tested, yes.

12 Q. And remember, both of these grocery boxes have that
13 disclaimer on them. Both of these grocery boxes expressly
14 state that they don't come from Reynolds, right?

15 A. That's correct.

16 Q. And you didn't know that when you did your survey?

17 A. That's correct.

18 Q. Because I think nobody actually gave you the boxes, at
19 least the grocery boxes with the disclaimers on them before you
20 did your survey, right?

21 A. That's correct.

22 Q. And you agree with me, Ms. Butler, that knowing whether
23 the grocery boxes had disclaimers on them would have been a
24 useful piece of information for you to know, right?

25 A. It would have been useful, yes.

Q. Because you would want to understand how consumers --

1 S. Butler - Cross

474

2 whether and the extent to which consumers reacted to that
3 disclaimer, right?

4 A. Yes.

5 Q. And you didn't do that survey, and so you don't have any
6 idea how consumers would react to that disclaimer, right?

7 A. I did not do a survey with a box with the disclaimer,
8 that's correct.

9 Q. And the last box you looked at that we talked about is
10 this red box, red and blue box, right? This is what I think we
11 have called the trade show box. It is Defendant's Exhibit 257.

12 Now, you also, did you not, in your deposition tell
13 me that the results you got on the Dollar Tree box would not be
14 any different or wouldn't be materially different than what you
15 would expect consumers to say about the trade show box,
16 correct?

17 A. I said it was possible that the trade show box would get
18 similar results, yes.

19 Q. You actually again believe there is a scientific basis for
20 you to conclude based on the survey that you did that the trade
21 show box would result in as much confusion or comparable
22 confusion to what the Dollar Tree box did, correct?

23 A. I said it's possible that that box would get similar
24 results, yes.

25 Q. And again, you believe that there is a scientific basis
for you to say that?

S. Butler - Cross

475

1 A. Yes.

2 Q. Based on the -- based on your view that your survey did
3 all the appropriate stuff and did it in the right way, correct?

4 A. That's correct.

5 Q. Now, are you aware that in the last two-and-a-half weeks
6 even Reynolds has said that Exhibit 257, the trade show box,
7 even Reynolds has said that this box is okay for Handi-Foil to
8 use? Do you know that?

9 A. Yes.

10 Q. Okay. You are aware, aren't you, that a couple weeks
11 ago -- if you turn in your binder to Exhibit 264 -- Kentaro, if
12 you would put 264 up.

13 You are aware that on March 11 of this year, just two
14 weeks before we began this trial -- well, let me take a step
15 back.

16 You are aware that throughout the entirety of this
17 case Reynolds has taken the position, similar to you, that this
18 red box infringes Reynolds' trade dress rights, correct?

19 A. That was my understanding, yes.

20 Q. And you are also aware that now, if we can go to page 2 of
21 Exhibit 264, that Reynolds has said they will never sue
22 Handi-Foil, its subsidiaries, or affiliate companies over this
23 trade show box, correct?

24 A. Yes.

25 Q. And you are aware that Mr. Shulman, who is sitting here in

1 S. Butler - Redirect

476

2 the courtroom today, signed that and submitted it to this Court
3 promising they would never sue on this box again, right?

4 A. Yes.

5 Q. Notwithstanding the fact that you believe it is every bit
6 as infringing as the other three Handi-Foil boxes that are at
7 issue in this case, correct?

8 A. Well, I think infringement is a legal issue.

9 Q. It's every bit as confusing --

10 THE COURT: Don't ask those questions.

11 MR. CALLAHAN: Okay.

12 THE COURT: You have got the facts out. Let's move
13 on.

14 MR. CALLAHAN: Right.

15 BY MR. CALLAHAN: (Continuing)

16 Q. You're aware that this box is okay now, right?

17 A. Yes.

18 MR. CALLAHAN: Nothing further, Your Honor.

19 REDIRECT EXAMINATION

20 BY MR. FROEMMING:

21 Q. Ms. Butler, at about 2:55, about a half hour ago, before
22 he picked up the Ultra Foil box, Mr. -- counsel had a
23 Handi-Foil box along side a Reynolds box and some of the
24 Handi-Foil boxes.

25 Did you see how long it took even counsel to pick out
the Handi-Foil box from this array of boxes on the table?

1 D. Bryla - Direct

540

2 sales have you lost to Handi-Foil since they introduced this
3 new packaging beyond Dollar Tree?

4 A. Beyond Dollar Tree? We've lost about a share point of
business so far.

5 Q. What do you mean by a share point of business?

6 A. So the entire -- in the retailers where Handi-Foil has
7 gained distribution, our share has gone down about a point, so
8 a share represents 1 percent of the total market, and so if you
9 take a look at it from a, what our sales were doing versus what
10 they are doing after Handi-Foil gained distribution, we've lost
11 about a share point.

12 Q. What -- in terms of the overall size of the market, what
13 does one lost share point represent?

14 A. The total market is about \$800 million in sales, and one
15 share point is worth \$8 million.

16 Q. And what is the profit, what is the profit of Reynolds on
17 \$8 million of business?

18 A. It's \$3 million.

19 Q. Where -- at what retailers have, to your knowledge, has,
20 if any, has Handi-Foil's new package taken away sales?

21 A. We know at, at Buy Low, at Winn Dixie, Jewel, Hy-Vee, and
22 Albertsons in Phoenix.

23 Q. All right. And are these small, medium, or large
24 retailers?

25 A. They're, I'd call them between medium and large. They

D. Bryla - Cross

565

1 Q. Okay. What were Reynolds' sales in 2013 of Reynolds Wrap?

2 A. Oh, Reynolds Wrap?

3 Q. If we were to, if we were to just fill in the last full
4 year that wasn't on what you put in front of the jury, what
5 would that be?

6 A. About \$435 million.

7 Q. Okay. Now, you were here -- you've been here throughout
8 the entirety of the trial; is that correct?

9 A. Correct.

10 Q. So you heard Mr. Mickle testify?

11 A. Yes.

12 Q. Twenty-some years running the Reynolds brand, right?

13 A. Yes.

14 Q. And he was your immediate predecessor?

15 A. No.

16 Q. Was there somebody in between him and you?

17 A. Doug was responsible for product services, advertising,
18 which reported up in to my predecessor at Reynolds, who
19 ultimately wound up reporting to me, if that helps.

20 Q. So Ken Lane, whose testimony we're going to hear next in
21 this case by videotape, Ken Lane succeeded Mr. Mickle in the
22 responsibility of -- that he had; is that right?

23 A. No, not really. So there's the line functions, which are
24 the general management roles, which Ken Lane has right now, and
25 the guy before him was Jeff Johansen, and Doug Mickle has a

D. Bryla - Cross

566

1 marketing services role, which is a staff function which
2 supports the general management function.

3 So right now in my organization, I have a head of
4 integrated marketing communications which reports to me, which
5 would have been the Doug Mickle job back in the day.

6 Q. Okay. So you heard Mr. Mickle's testimony about the sort
7 of history of the Reynolds brand and how Reynolds always uses
8 the same design the same way and all that kind of stuff, right?

9 A. Correct.

10 Q. You heard him talk about the Reynolds, the brand and the
11 image being the, the pink, the three silver sort of curved
12 stripes, the reflex blue, and the Reynolds name, right?

13 A. Yes.

14 Q. And you'd agree with, with all the stuff that Mr. Mickle
15 said in that regard. We don't have to cover that again, right?

16 A. Correct.

17 Q. Was there anything Mr. Mickle said that you thought was
18 wrong or that you disagreed with?

19 A. No.

20 Q. Okay. So we don't have to cover the things we went over
21 with Mr. Mickle because you were here, you heard them, you
22 agree with them all.

23 A. He did mention it was blue, not reflex blue, but besides
24 that, yeah.

25 Q. Well, when you use it on the box, it's always reflex blue,

D. Bryla - Cross

567

1 right?

2 A. Yes, but the trademark is not for reflex blue. Yes.

3 Q. The trademark is just blue, but when you use it on the
4 box, it's always reflex blue?

5 A. Yes.

6 Q. Okay. All right. So we're not going to go into those
7 things since it sounds like you and Mr. Mickle are in accord
8 with everything he said originally.

9 Now, isn't it the case that Reynolds sometimes
10 purchases aluminum foil from a company called Novelis?

11 A. Correct.

12 Q. So it's not, it's not accurate that Reynolds makes all of
13 its own aluminum foil, right?

14 A. For the foil that's in the consumer boxes, it's all made
15 internally.

16 Q. Okay. But Reynolds does purchase foil from Novelis?

17 A. Yes, to use for private label or other non-Reynolds Wrap
18 uses, yeah.

19 Q. Okay. So we'll talk about private label in a minute.

20 Now, you indicated that -- I think this was the last
21 question, and Mr. Froemming said he would have one question,
22 and he only had one question, which he should be complimented.
23 In that last question, you said one of your big concerns was
24 that consumers would have negative experiences with Handi-Foil
25 and that would come back on Reynolds Wrap; is that right?

D. Bryla - Cross

568

1 A. Negative experiences with substandard foil, yes.

2 Q. Okay. But you didn't talk to the jury about any actual
3 evidence of anybody having a negative experience, right?

4 A. No.

5 Q. Because you're not aware of any?

6 A. None. I wouldn't imagine if someone had a negative
7 experience with someone else's product, they would call
8 Reynolds Wrap and tell them about it.

9 Q. Okay. You haven't seen any evidence in this courtroom
10 during Reynolds' time to put on its case that any of the 30 to
11 31 million people that purchased Handi-Foil over the last two
12 years had a negative experience with that?

13 A. Not that I'm aware of.

14 Q. And no information like that filtered up through Reynolds,
15 you know, all the friends that you've got on Facebook or any of
16 the other sophisticated marketing tools that you guys have got
17 at Reynolds for staying in touch with your consumers, right?

18 A. Actually, I did see some posts on social media.

19 Q. None of those are coming into evidence in this case, are
20 they?

21 A. Not that I'm aware of.

22 Q. And you said you wouldn't expect somebody who had a
23 problem with, let's use the Handi-Foil Dollar Tree box as a
24 example, you wouldn't expect somebody who had a problem with
25 the Handi-Foil box to call Reynolds, would you?

D. Bryla - Cross

569

1 A. No, I would not.

2 Q. Because they'd know to call Handi-Foil, right?

3 A. Correct.

4 Q. Because they would look at the box, even a two- to
5 three-second look at the box tells you who makes it, right?

6 A. Correct.

7 Q. Now, Mr. Bryla, I got the impression from your testimony,
8 I just want to make it clear, is it your testimony that
9 Reynolds sells in the stores for the same amount as, let's say,
10 store brands or as it does for Handi-Foil?

11 A. Do you mean retail price?

12 Q. Yeah. So when I, the customer, walk into -- where I'm
13 from, I go into Jewel. That's one of the places that you guys
14 sell?

15 A. Correct.

16 Q. Right across the street from us. I go into Jewel, and
17 there's a number of different aluminum foil products. Is it
18 your testimony that when I, the consumer, walk in there, all
19 those things are priced about the same?

20 A. I didn't say that. What I said was --

21 Q. So I just want to make clear, when I, the consumer, walk
22 in, Reynolds is the most expensive, store brand less expensive,
23 and sometimes there's a discount brand that's even less
24 expensive than that?

25 A. For some days of the year, yes.

D. Bryla - Cross

605

1 A. It did not.

2 Q. Another thing that happens -- and we saw evidence of some
3 of these and, I think, even in your own testimony -- is people
4 will enter into what's called a consent judgment, right?

5 A. I'm sorry, I don't know what that is.

6 Q. So somebody says: You've taken me to court. I'll now
7 agree to stop.

8 A. Okay.

9 Q. And there's a variety of reasons people can do that,
10 right?

11 A. Tell me.

12 THE COURT: He said he's not familiar with the words.

13 MR. CALLAHAN: Okay.

14 THE COURT: And then -- let's move on to something
15 else.

16 MR. CALLAHAN: Fair enough.

17 Q. Again, I'd just like to close, I think, on sort of where
18 we started, Mr. Bryla. As you sit here today, Reynolds' last
19 witness, and having heard that there's 30 million, almost 31
20 million boxes of the products that are at issue in this case
21 out there in the marketplace, you folks still aren't aware and
22 the jury is not going to hear any evidence of any real consumer
23 in a store being actually confused into thinking that those
24 Handi-Foil products came from Reynolds, correct?

25 A. We have not done store intercepts to ask consumers on the

D. Bryla - Cross

606

1 spot if they're confused, but we do know in stores where
2 Handi-Foil and Reynolds are sitting side by side, we've lost
3 some market share. So, you know, we'll find out over time.
4 You know, we get what's called panel data, and we'll see if
5 consumers have switched from -- because Handi-Foil clearly
6 picked up some business. The business didn't come out of thin
7 air, right?

8 Q. That's right.

9 A. And so the question is did it come from private label or
10 did it come from Reynolds, and then we'll be able to find out
11 what was the rationale of why they bought it, but those types
12 of -- that type of market research takes some time to, you
13 know, to analyze, and we don't have that admissible today.

14 Q. More than two years?

15 A. No, not more than two years, but we don't even have our
16 first round of panel data yet as a result of this. The sample
17 size is not big enough.

18 Q. If when you brought this case you thought that was a
19 question that was important enough to find out the answer to,
20 you could have done these panel things in the preceding year,
21 correct?

22 A. There wouldn't be a large enough sample size. There
23 weren't enough boxes sold to make an impact on that.

24 Q. And in your opinion, the only thing we care about in this
25 case -- we don't care, it's perfectly okay if consumers are

1 THE COURT: All right.

2 MS. BRADLEY: -- all four pages -- three pages.

3 Reynolds would also like to put into the record some
4 of the stipulated facts that the parties have agreed to in this
5 case.

6 THE COURT: Go ahead, please.

7 MS. BRADLEY: Stipulated Fact No. 3: "Reynolds'
8 Reynolds Wrap brand aluminum foil roll products are currently
9 sold in the boxes depicted below, possibly among others:"

10 "The blue color on the Reynolds roll foil packaging
11 is called reflex blue." That was No. 4.

12 "12. Handi-Foil has manufactured, offered for sale
13 and sold consumer aluminum roll foil products since
14 approximately 2001 or 2002.

15 "13. Handi-Foil manufactures, offers for sale, sells
16 and has sold aluminum roll foil in the 'Dollar Tree Package'
17 depicted below:

18 "14. Handi-Foil has sold and continues to sell
19 aluminum foil in the Dollar Tree Package to Dollar Tree Stores,
20 Inc., ('Dollar Tree') in the United States, which resells the
21 product to consumers.

22 "15. Dollar Tree began selling aluminum foil in the
23 Dollar Tree Package in March 2012.

24 "16. Dollar Tree has approximately 4,600 stores
25 located in all 48 contiguous states and the District of

1 Columbia.

2 "17. The Dollar Tree Package contains the
3 statement, 'Compare to Reynolds Wrap Foil.'

4 "18. Handi-Foil has manufactured, offered for sale
5 and sold consumer aluminum roll foil in the package designed as
6 depicted below.

7 "20. Handi-Foil has offered for sale or sold
8 aluminum roll foil in the Blue Box 2 Package in the following
9 sizes:

10 "21. Handi-Foil manufactures and sells consumer
11 aluminum roll foil in the package designed as depicted below
12 (the 'Grocery Box'):

13 "22. Handi-Foil has offered for sale or sold
14 consumer aluminum foil roll products in the Grocery Package to
15 grocery stores, discount stores and dollar-type stores
16 nationwide."

17 Let's go to No. 24. "Handi-Foil has offered aluminum
18 foil roll for sale in the Grocery Box in the following sizes:

19 "25. Handi-Foil has sold and continues to sell
20 aluminum foil roll products in the Grocery Box in the following
21 sizes:

22 "29. Defendant has been selling Handi-Foil brand
23 consumer aluminum roll foil to Dollar Tree in the Dollar Tree
24 Box continuously since March 2012."

25 Let's go to No. 31. "From March 2012 to August 5,

1 we don't have a problem with that, Your Honor.

2 THE COURT: All right.

3 MS. BRADLEY: We can limit it to the ones I read in.

4 THE COURT: All right, good. Thank you.

5 MS. BRADLEY: Plaintiff rests.

6 THE COURT: All right. Then we're going to have a
7 conversation for a few minutes, and then we'll, we'll get you
8 back in, but we'll at least take 15 minutes for our mid-morning
9 break. So you're excused at this time. Thank you.

10 (Jury out.)

11 MR. CALLAHAN: Your Honor, one housekeeping thing for
12 Mr. Bryla. We move to admit Defendant's Trial Exhibit 37.

13 THE COURT: All right, any objection?

14 MR. FROEMMING: What is 37?

15 MR. CALLAHAN: 37 is the e-mail chain.

16 MR. FROEMMING: No objection.

17 THE COURT: That you used in cross?

18 MR. CALLAHAN: Yes, sir.

19 THE COURT: All right, it's received.

20 All right, Mr. Callahan?

21 MR. CALLAHAN: Yes, sir. Your Honor, we would move
22 for judgment as a matter of law on all counts: trademark
23 infringement, Count 1; false designation of origin, Count 2;
24 trade dress infringement, Count 3; Virginia state trade law
25 trademark infringement, Count 5; and Virginia state law unfair

1 competition, Count 6. These all in our view, Your Honor, rise
2 and fall together.

3 The elements are Reynolds has got a mark, Handi-Foil
4 uses it, Handi-Foil's use occurred in commerce in connection
5 with the sale, offering for sale, distribution, or advertising
6 of goods and services, and that Handi-Foil used the mark in a
7 manner likely to confuse consumers.

8 As to trade dress infringement, the elements are that
9 the trade dress is primarily nonfunctional, the infringement
10 creates a likelihood of confusion, and the trade dress is
11 inherently distinctive or has created -- has acquired secondary
12 meaning.

13 State law trademark infringement also looks to
14 likelihood of confusion. State law unfair competition requires
15 the same proof, including likelihood of confusion, as the
16 Lanham Act defenses. I'm not going to read all nine of the
17 Fourth Circuit's likelihood of confusion factors into the
18 record. The Fourth Circuit said these serve as a guide rather
19 than a formula, not all equal. Obviously, they get weighed
20 separately.

21 With respect to the similarity of the marks, start
22 with the trademark. That's also lined for blue, silver bands,
23 pink. The other mark has got the Reynolds name. Reynolds' own
24 witness testified that three of those four things are missing
25 and he wasn't sure about the fourth.

1 And again, the most important thing there is that the
2 Handi-Foil products all say "Handi-Foil," Reynolds Wrap
3 products all say "Reynolds Wrap," and there's been not an
4 instance of actual confusion, notwithstanding the fact that for
5 two years, 30 million of these -- 31 million almost of these
6 products have been sold.

7 Reynolds has also not shown in its case-in-chief any
8 intent to infringe with respect to the products at issue.

9 Ms. Butler's survey, as you heard her admit, tested -- did not
10 test the trademark issues at all, did not test dilution at all,
11 tested only the Dollar Tree box. There's no even evidence of
12 likelihood of confusion with respect to either of the two
13 grocery boxes or any of the nonstick boxes, and again, there's
14 no evidence of actual confusion.

15 One, Your Honor, I would ask Your Honor to give
16 serious consideration to is Count 4. Count 4 is dilution. The
17 elements of dilution are that Reynolds own a protectible mark,
18 it's famous and became famous before 2012, it's distinctive,
19 that Handi-Foil used in commerce a mark different than
20 Reynolds, and that Handi-Foil's use of the mark is likely to
21 cause dilution of Reynolds' mark by blurring or tarnishment.
22 Now I think they've taken out the tarnishment. It doesn't
23 appear in their jury instructions anymore.

24 The elements of dilution or blurring are the degree
25 of similarity, inherent or required distinctiveness, the extent

1 to which the owner is engaged in substantially exclusive use of
2 the mark, degree of recognition of the famous mark, whether the
3 user intended to create an association with the famous mark,
4 and any actual association between the mark and the famous
5 mark.

6 We haven't heard a single word from anyone, their
7 survey expert didn't say anything -- she didn't survey the
8 issue of dilution; she conceded that. No witness for Reynolds
9 has said anything and no witness for Handi-Foil or any of those
10 things that they read in, no one has even mentioned to this
11 jury dilution or blurring, and so there really isn't any
12 evidence at all as to which the jury could reach a verdict in
13 favor of Reynolds on that point.

14 Count 8 is the false advertising case. There is no
15 evidence of any literal falsity. The testing evidence that is
16 in the record says the products are comparable. Reynolds
17 admitted that they have testing of both their products and
18 Handi-Foil's products; we just heard that. They didn't put
19 that into evidence, so all we have is the test evidence that
20 says comparable, comparable, comparable.

21 THE COURT: You didn't put it into evidence either,
22 right?

23 MR. CALLAHAN: All those things are in evidence, Your
24 Honor.

25 THE COURT: You did not put -- I assume that you

1 sought any testing that Reynolds had done in your discovery,
2 and you didn't put in any evidence of their testing as well,
3 right?

4 MR. CALLAHAN: No, we didn't, Your Honor, and the
5 reason we didn't is because false advertising came in at the
6 close of discovery.

7 THE COURT: Ah, all right.

8 MR. CALLAHAN: We didn't -- and Reynolds didn't say
9 in their, in their response to Judge Jones' order: And here's
10 all the testing we're relying on. So we had no opportunity to
11 even get that testing from them, and they chose not to rely on
12 it. All we have is the STR testing, and that shows
13 conclusively that it's comparable.

14 THE COURT: What about the 2002-2003 testing and
15 Mr. Bryla's testimony about the equivalent 10 percent rule?
16 Isn't that evidence that the jury has to consider?

17 MR. CALLAHAN: That is evidence that the jury can
18 consider. Mr. Bryla, though, admitted he's not the testing
19 expert. The testing experts are the STR people.

20 THE COURT: For the tests but not the criteria for
21 the tests.

22 MR. CALLAHAN: Well, STR did the tests according to
23 their criteria. Mr. Bryla said and he testified at some length
24 Reynolds has different criteria. They try to tell people who
25 care you should use the Reynolds criteria. But there's no

1 dispute that the STR people faithfully followed their own
2 criteria in determining that these are all comparable.

3 THE COURT: All right, go ahead.

4 MR. CALLAHAN: Thanks, Judge.

5 THE COURT: Mr. Froemming?

6 MR. FROEMMING: Your Honor, I didn't hear any zingers
7 there.

8 THE COURT: No, no zingers.

9 MR. FROEMMING: In terms of likelihood of confusion,
10 the test is total image and appearance. That phrase is right
11 out of the Supreme Court case. There's evidence galore of a
12 likelihood of confusion between the total look and appearance
13 of the challenged Handi-Foil packages and the registered and
14 incontestably so Reynolds Wrap packaging design.

15 We have a survey in evidence from Ms. Butler showing
16 significant likelihood of confusion. We also have evidence of
17 reckless disregard of -- by Handi-Foil of Reynolds' claimed
18 trademark rights.

19 As to dilution, Your Honor, the same goes. We have
20 ample evidence that the packaging design, the incontestably
21 registered packaging design is famous, in fact, according to
22 the EquiTrend and Harris interactive polls, more famous than
23 any other -- others that are commonly thought of. If this
24 packaging design is not famous, Your Honor, nothing is. The
25 same goes with distinctiveness.

1 As to the dilution factors as well, the very factors
2 that counsel rattled off support a judgment for likelihood of
3 dilution. He mentioned degree of similarity. He mentioned
4 inherent or, I think, acquired distinctiveness. Again, an
5 incontestable -- an incontestable registration, Your Honor, is
6 irrebuttably presumed to have secondary meaning.

7 Substantially exclusive use, we put in evidence of
8 numerous enforcement efforts against third parties by Reynolds
9 over the years. There is nothing in the record to my knowledge
10 of any packaging design other than the challenged designs of
11 Handi-Foil that come close to the look and feel of the
12 incontestably registered Reynolds Wrap trade dress.

13 The last factor he mentioned was intent to create
14 association. We believe there's ample evidence of that,
15 including but not limited to the e-mails reflecting the
16 conscious attempt to match the color, match the laminate, copy
17 the yellow color of the nonstick box. That goes for all the
18 products.

19 As to literal falsity, two points, one legal, one
20 factual, Your Honor. The -- I don't have our proposed Fourth
21 Circuit jury instructions that quote Fourth Circuit law, but it
22 is generally law across this land that whereas here the
23 defendant makes in the nature of a tests show or a tests prove
24 advertising claim, that one way that that can be proven to be
25 false advertising is by putting in evidence that the purported

1 tests do not reliably support the proposition that is being
2 advertised.

3 That is the case here. It's the case here with
4 respect to the tests, the 2011 preferred tests by Handi-Foil
5 that they paraded around the country themselves and through
6 their sales reps, which based upon the tensile strength,
7 demonstrably the most important criterion of aluminum foil, the
8 most important property that Reynolds has, in fact, featured in
9 its advertising for over 55 years, is significantly lower, in
10 fact, more than 10 percent lower for its most popular selling
11 stock-keeping unit, or SKU, and also for the other size of
12 product that was reflected in the other test that Handi-Foil
13 likes from recent times. That's even before we get to the 2002
14 and 2003 tests, which they submitted product for, which they
15 paid for, and which say on their face the product is not
16 comparable.

17 We have admissions in the record that Handi-Foil is
18 the same old foil, just in a new package. We have testimony
19 and evidence that the, that the Reynolds Wrap branded foil is
20 the same as it's been, and as you pointed out, Your Honor,
21 Mr. Bryla testified both as to the 10 percent rule and as to
22 the criteria as they relate in the real world to evaluating
23 equivalence with respect to the most important aspect of
24 aluminum foil.

25 THE COURT: All right. At this stage, with the legal

1 review that I must undertake at the end of the plaintiff's
2 case, they've made out a prima facie case for each of the
3 counts. You know, these are uniquely, factually bound, and
4 there is evidence on both sides of the aisle for virtually
5 every one of the counts, but there's sufficient evidence of
6 each, including the dilution count.

7 You know, the jury has heard evidence of -- that can
8 be used for them to determine whether there's been blurring or
9 not and the other points that Mr. Froemming made with regard to
10 the famousness of the mark and the incontestability or weighty
11 considerations. You know, I don't know whether the jury is
12 going to listen to any more of this false advertising evidence
13 given that they now understand that Reynolds did some testing
14 of Handi-Foil products and didn't enter it into evidence, but
15 that they at this stage have the 2002-2003 reports and the 2011
16 report and Mr. Bryla's testimony about the criteria used, and
17 so there's a factual dispute as well as to whether there was
18 intentional false advertising in it.

19 So your exception is noted, and let's take, you know,
20 15 minutes and come back and begin your case, all right?

21 MR. CALLAHAN: Thanks, Your Honor.

22 THE COURT: All right, thank you. We're in recess.

23 (Recess from 11:01 a.m., until 11:17 a.m.)

24 NOTE: The case continues in the absence of the jury
25 as follows:

K.E. Lane, III - By Deposition

659

1 lead you to believe that a consumer would have a negative
2 experience with Handi-Foil?

3 A. I don't have any data or research.

4 Q. You mentioned earlier that you were concerned --

5 A. Yes.

6 Q. -- about the package because of confusion at the shelf.

7 A. Likely confusion at the shelf.

8 Q. So what did you mean by that?

9 A. That if this product was sold in distribution, which we
10 had found it at Dollar Tree, and if it had sold at other
11 locations as well, that a consumer would likely be confused.

12 Q. Okay. Are you aware of any instances where a consumer was
13 confused?

14 A. Directly no.

15 Q. Any indirect?

16 A. Yeah.

17 Q. How?

18 A. Anecdotally a fellow employee of ours expressed to me that
19 he took the box home, handed it to his wife, and she expressed,
20 she said, why are you giving me this Reynolds Wrap box? And he
21 said, that's what I thought, it's not Reynolds Wrap.

22 Q. And who was that?

23 A. That was our general counsel, Larry Tuskey. Myself, I was
24 confused when I first received the samples. They sat on my
25 desk probably for a week before I even examined them because I

K.E. Lane, III - By Deposition

660

1 didn't think to look at them because they looked -- I thought
2 they were just some other samples of Reynolds Wrap, to be
3 honest with you.

4 I get samples delivered to my office frequently from
5 trial runs or packaging runs. I figured there would be an
6 e-mail somewhere in the pile about what this was for.

7 Q. Okay.

8 A. And then when I finally looked at it, I realized that it
9 was not in fact our product.

10 Q. Ever have any retailer or person in the trade express any
11 confusion about the package?

12 A. No.

13 Q. Ever heard of an end user expressing any confusion as to
14 the package?

15 A. Not to me.

16 Q. To anyone?

17 A. Not that's been played back. But we don't monitor end
18 user sales at the shelf.

19 Q. Was Reynolds Consumer Products concerned about the
20 placement of this package in the Dollar Tree stores, or are you
21 more concerned with grocery?

22 A. I wasn't as concerned about placement in Dollar Tree
23 outside of the likely confusion I thought their consumers may
24 have when purchasing the product.

25 Q. So is your concern that if someone sees the Handi-Foil

K.E. Lane, III - By Deposition

661

1 package sitting on the shelf, they're going to think that
2 that's a Reynolds package?

3 A. I think that that is likely.

4 Q. Why were you not as concerned about placement in Dollar
5 Tree as compared to grocery?

6 A. Well, we had -- that was a class of trade that we couldn't
7 efficiently service anymore. Dollar Tree is a retailer that
8 retails products at \$1 and not above. And that was a price
9 point that we could not efficiently hit, and we were going to
10 basically vacate that price point with Reynolds Wrap.

11 So I assumed Dollar Tree would continue to sell
12 aluminum foil. So Handi-Foil gaining distribution there,
13 outside of what I thought was, you know, a confusing package,
14 was not surprising or the end of the world.

15 Q. So, is it placement or distribution in the grocery
16 channels that's more concerning to Reynolds Consumer Products?

17 A. What's concerning to me is twofold. I'm more than willing
18 to compete with them in other classes of trade. What's
19 concerning to me is their dilutive effect on the category and
20 likely confusion that consumers may see in their packaging.

21 Q. This dilutive effect you're talking about, that's what we
22 were talking about earlier about the not bringing in new
23 consumers?

24 A. Correct.

25 Q. Okay. Would that dilutive effect exist if Handi-Foil sold

K.E. Lane, III - By Deposition

662

1 its package in a green and yellow box?

2 A. I suppose it depends on what their pricing in the
3 marketplace would be.

4 Q. Does it have anything to do with the design of the
5 package?

6 A. Once again, the only design of the package could produce
7 is in my opinion likely confusion from a consumer that may
8 purchase it. And if they have a negative experience, since
9 it's a quality that I don't control, and they believe that they
10 purchased Reynolds Wrap, you know, and that they have negative
11 experience with the category and choose not to buy the category
12 anymore and move on to different solutions in their kitchen.

13 Q. Is that separate from the dilutive effect you were talking
14 about earlier where --

15 A. No. That would be dilutive in terms of poor experiences
16 with products of a particular category, particularly if you're
17 confused and you thought you purchased the category leader
18 whose name and product is synonymous with that category,
19 meaning that you would then not purchase that category anymore
20 and the category would shrink in size.

21 Q. Does Reynolds Consumer Products monitor customer
22 complaints?

23 A. We do.

24 Q. Are you aware of any complaints of someone complaining
25 about the quality of a product that you learned was Handi-Foil

K.E. Lane, III - By Deposition

663

1 and not Reynolds?

2 A. Not -- no.

3 Q. Does the Reynolds Consumer Products Web site have like a
4 place that consumers can post comments or questions about the
5 product?

6 A. I think we have a submission form on our Web site, yes.

7 Q. And are those monitored or reviewed?

8 A. Oh, yes.

9 Q. Were there any submissions that were given with someone
10 believing that they had purchased a Reynolds product that
11 turned out to be Handi-Foil?

12 A. I'm not aware of any, but most people if they think they
13 purchased Reynolds Wrap wouldn't submit something that said I
14 bought Handi-Foil and it's not Reynolds Wrap.

15 Q. Well, would you investigate if there was a quality issue
16 or a problem?

17 A. We do investigate, yes.

18 Q. Have you done any investigations where you determined that
19 quality issues were actually due to a Handi-Foil product?

20 A. I'm not aware of any.

21 Q. So you don't think the use of the Handi-Foil trade name
22 itself is a distinguishing element?

23 A. Within the context of the whole trade dress, no.

24 Q. Why not?

25 A. Because our box has a distinct look and overall feel to

K.E. Lane, III - By Deposition

678

1 between Reynolds Wrap and the Handi-Foil accused packages?

2 A. Not as of yet.

3 Q. Is Reynolds aware of any instance of a consumer being
4 deceived about a relationship between Reynolds Wrap and the
5 Handi-Foil branded aluminum foil packages?

6 A. Not as of yet.

7 Q. Okay. Now turn to topic 14, please. Any facts that
8 support or refute Reynolds' contention that it is entitled to
9 any form of relief including, but not limited to, injunctive
10 and monetary relief. Are you prepared to testify on behalf of
11 Reynolds on topic 14?

12 A. Yeah, I guess to the best of my ability.

13 Q. Is it Reynolds' contention that it's been harmed by the
14 Handi-Foil accused packages?

15 A. I believe our contention is that consumer confusion is
16 likely.

17 Q. Okay. Does Reynolds contend it's been harmed?

18 A. I believe that there would be and likely to be harm either
19 from a dilutive effect, as we talked about, or, you know, a
20 direct consumer confusion effect.

21 Q. How would a direct consumer confusion effect harm
22 Reynolds?

23 A. They chose to buy somebody else's product.

24 Q. So a lost sale?

25 A. Potentially.

K.E. Lane, III - By Deposition

679

1 Q. So sitting here today, you're not aware of any lost sales,
2 is that correct?

3 A. I'm not aware of any data around that, yes.

4 Q. And how has this dilutive effect harmed Reynolds?

5 A. The dilutive effect, I think, is likely as a spread in
6 distribution.

7 Q. So sitting here today, you think there is a likelihood of
8 harm, but you're not aware of any actual harm at this point?

9 A. I'm not aware of actual -- yeah, I think harm is likely.

10 Q. Let's look at the complaint. Reynolds has alleged in its
11 complaint that it has been harmed by these packages, and I'm
12 just trying to figure out how.

13 A. Well, they currently are on shelf at certain retailers.

14 Q. Okay.

15 A. So in that regard I believe that we have been harmed. The
16 extent of that harm I don't have data around.

17 Q. Has the strength of Reynolds' brand been diminished by the
18 Handi-Foil branded accused products?

19 A. It's a strong brand. I believe that it could likely be
20 harmed if a consumer was confused, bought the product, had a
21 negative experience with a product they believe to be ours,
22 that we didn't control the quality.

23 Q. All right. Do you have any facts to support a contention
24 that the Reynolds Wrap brand has been diminished by the sale of
25 Handi-Foil and the accused packages?

K.E. Lane, III - By Deposition

680

1 A. I don't have any, I have not seen any facts to that
2 regard.

3 Q. Okay. What facts does Reynolds Consumer Products have
4 with respect to the dilutive effect that you've referred to?

5 A. The context which I've used it is a potential dilutive
6 effect as they grow distribution. And the dilutive effect is
7 not only to our brand but also to the category, which we
8 covered.

9 Q. Okay. Does Reynolds Consumer Products have any facts to
10 support that it's actually had a dilutive effect on its brand?

11 A. I don't have any surrounding that at this time.

12 Q. Okay. And does Reynolds believe that the likely confusion
13 is going to result in harm to the Reynolds brand?

14 A. Yes.

15 Q. How so?

16 A. A confused consumer would pick up this package that I
17 can't guarantee the quality or the performance of the product
18 within that box and potentially have a negative experience
19 believing they have purchased Reynolds Wrap.

20 Q. Are there any facts that Reynolds has that it would not be
21 able to be compensated monetarily for the sale of the accused
22 packages?

23 A. I would say a 66-, soon to be 67-year-old brand's
24 reputation, if harmed, could not be compensated monetarily.

25 Q. Okay. Do you have any facts or data to support that the

K.E. Lane, III - By Deposition

681

1 66-, soon to be 67-year-old brand's reputation has been harmed?

2 A. Not as of yet.

3 Q. Sitting here today, are you aware of any loss of market
4 share in the aluminum roll foil product that Reynolds Consumer
5 Products has experienced after the introduction of the
6 Handi-Foil accused packages?

7 A. I don't have data around that.

8 Q. Do you have any inclination, given your role at the
9 company?

10 A. Yeah. My inclination is that we have lost some potential
11 market share.

12 Q. Okay. So as part of your business, are you aware of any
13 surveys, polls, or any other research that Reynolds Consumer
14 Products has done with respect to the Handi-Foil accused
15 packages?

16 A. We've not done any and we don't have any currently
17 planned.

18 Q. I am going to hand you what's been marked as Exhibit 56,
19 which for the record is RHF 00020492 through 20532, which is
20 the specific document referenced in the topic. This is labeled
21 2013 Foil Line-up Private Label.

22 Has Reynolds put together similar documents for
23 previous years?

24 A. I'm not aware if we did or not. We did this -- my team is
25 relatively new. I believe we probably did one in 2012, but I

D. Sarnoff - Cross

723

1 Q. Okay. Did it ever occur to you that by having a blue on
2 the left and red on the right new packaging design for your
3 product and putting Reynolds' trademark name on it, that people
4 might associate it with Reynolds?

5 A. Absolutely no. I did not think they would associate it
6 with Reynolds. It says "Compare to Reynolds Wrap" on there.
7 People will know that it's not Reynolds, and it says
8 "Handi-Foil" on the box.

9 Q. I don't want to inquire into any privileged communications
10 you've had with your counsel, but just as a non-lawyer, do you
11 understand that a likelihood of confusion that is trademark
12 infringement can be found either if there is a likelihood that
13 people would think that your designs were made or put out by
14 Reynolds or somehow affiliated or associated with Reynolds or,
15 or if people would think that you had obtained permission from
16 Reynolds to use this design?

17 Do you understand that?

18 A. What was the question?

19 Q. Did you understand that a, that there could be trademark
20 infringement, that trademark infringement arises if there's a
21 likelihood either that people would think that this, from this
22 overall look and feel, that this came from Reynolds Wrap, or if
23 it was affiliated or associated in some way with Reynolds Wrap,
24 or if people would think that, that the person putting out this
25 box had obtained the permission of Reynolds to use this overall

D. Sarnoff - Cross

724

1 look and feel?

2 A. It's a very long question. We sold 31 million boxes of
3 retail roll foil. We received no e-mails or any comments from
4 consumers or the retailers of anybody being confused, thinking
5 the product was from Reynolds. The product says "Handi-Foil"
6 clearly, and it says "Compare to Reynolds" on the bottom.

7 THE COURT: All right, so answer the question now if
8 you can --

9 THE WITNESS: I'm not really sure what the question
10 is, to be honest. I'm not trying to be difficult. I don't
11 really understand.

12 THE COURT: It's a legal standard that you're
13 unfamiliar with; is that fair to say?

14 THE WITNESS: I'm not a lawyer. I do sales and
15 marketing.

16 THE COURT: All right, let's move on.

17 THE WITNESS: I don't want to answer wrong.

18 BY MR. FROEMMING:

19 Q. Well, you said at the top of your direct that if you saw
20 any evidence, that you would have made adjustments to the box.
21 You said that, right?

22 A. I did say that.

23 Q. And by "evidence," were you referring to evidence of
24 likelihood of confusion, which is the standard for trademark
25 infringement?

1 P. Perkins - Direct

840

1 specific sales for each of the accused packages for this year
2 to date, we would basically take the 75 pages of DTX 59 and add
3 up those individual item numbers?

4 A. That's correct. I think on page 2 I see one of the
5 numbers is 12200, that's one of the accused products. I could
6 just total up the sales in year to date quantity 2013 or 2012,
7 I am not sure if we sold it in 2012, looks like a little bit,
8 we could total up that item number and get the total sales for
9 any one of those items.

10 Q. You mentioned this came out of your computer system. Is
11 Exhibit DTX 59 the type of information you keep in the ordinary
12 course of your business?

13 A. It is.

14 Q. To date, how many boxes of the accused products has
15 Handi-Foil sold?

16 A. I believe we are at about 30.7 million boxes.

17 Q. What have the revenues by for those packages to
18 Handi-Foil?

19 A. The total revenue for the last two years, we just closed
20 the 2013 period, is just over 23 million of sales.

21 Q. Okay. And that's your revenue?

22 A. That's our total revenue.

23 Q. Are the sale of the accused products, the Dollar Tree
24 package and the grocery packages we've been looking at, are
25 those a profitable business for Handi-Foil?

R. Kivetz - Direct

936

1 A. Based on the different research that I conducted, that I
2 described earlier, reading the pleadings in the case, speaking
3 with the executives for Handi-Foil, importantly visiting stores
4 in the marketplace, what I determined is that typically in the
5 Dollar Tree stores consumers would face, would encounter three
6 aluminum foil products. One is the allegedly infringing
7 aluminum foil by Handi-Foil, this package, the accused package.

8 Another product that they typically would encounter
9 would be the Reynolds Wrap 18-square foot package, which I also
10 used in my survey.

11 And the third product that they would typically see
12 in the Dollar Tree stores was an Ultra Foil, private label
13 product that had 40 square foot on it.

14 Q. I am going to hand you what has been marked and previously
15 admitted as DTX 58, and then what has been marked for
16 identification purposes as DTX 286.

17 Can you describe for the jury what those packages
18 are.

19 A. Sure. So this, we have already discussed, this is the
20 allegedly infringing Handi-Foil product that was sold in the
21 Dollar Tree store and only in the Dollar Tree.

22 This is the Reynolds Wrap 18-square foot product that
23 typically was also sold in the Dollar Tree stores side by side
24 on the same shelves with the Handi-Foil product.

25 And this is the Ultra Foil aluminum foil product 40

1 R. Kivetz - Direct

937

2 square foot that also was typically sold side by side in the
3 same shelves with these two other products in the Dollar Tree
stores.

4 Q. And how did you determine that these three products are
5 sold side by side in Dollar Tree stores?

6 A. In a couple of ways. One is I visited stores, Dollar Tree
7 stores. I had an assistant of mine also visit multiple Dollar
8 Tree stores. And I also spoke with the executives for
9 Handi-Foil, including Jim Oesterreicher, who is the account
10 manager into the Dollar Tree.

11 Q. Okay. Let's turn to the third principle we mentioned, the
12 proper control. What was your goal for developing and
13 selecting a control in this case?

14 A. My goal was to create a valid, reliable scientific
15 control, like a placebo for a drug, that would remove most or
16 all of the elements that the plaintiff, that Reynolds is
17 claiming are infringing on their product.

18 A control that would remove or change most of the
19 packaging elements on the Handi-Foil product that Reynolds is
20 saying are causing people to be confused. That's what is at
21 stake in this case, that's what the likelihood of confusion
22 survey should test.

23 At the same time, my goal was to keep everything else
24 on the package the same.

25 So, for example, the name Handi-Foil, that name mark

1 come back at 2:00, and have lunch, and then that appears to be
2 the end of the evidence in the case, and we'll -- if, if the
3 case is going to continue on, then we'll have closing arguments
4 and jury instructions at that time, all right? So you're
5 excused at this time to come back at 2 p.m.

6 (Jury out.)

7 THE COURT: All right, have a seat. Do you want to
8 renew your motion at this time?

9 MR. CALLAHAN: Your Honor, we would at the close of
10 our evidence now renew our motion for judgment as a matter of
11 law for all the reasons that we stated in our initial motion
12 for judgment as a matter of law following the conclusion of
13 plaintiff's case.

14 THE COURT: All right, thank you. And I'm going to
15 deny it at this time. I think that again, there's issues of
16 fact for each of the counts in the complaint that it's up to
17 the jury to resolve.

18 I've looked at the jury instructions, and I thank you
19 again for working through those, and as I understand it, we
20 only have a couple of instructions where Reynolds disagrees
21 with the proposed instruction of Handi-Foil: 33, 36, 40, and
22 43.

23 Mr. Froemming, is that your understanding?

24 MR. FROEMMING: Just a second, Your Honor. I'm just
25 checking the numbers.

1 sales, four-and-a-half billion dollars over a period of time,
2 300 million in advertising. And he wants people to believe,
3 and he testified under oath, that we, our presence caused them
4 to lose, Handi-Foil's presence caused them to lose a point in
5 market share, \$8 million, \$3 million in profit.

6 And I looked at this and I said, boy, there is a
7 line. Can you highlight that gap in between 2012 and Total.
8 And I said, there is a line in between 2012 and the total. I
9 don't know if that is just an extra line somebody put in there.
10 I said, wait a second, it's 2014. That's 2013. That's the
11 year in which Mr. Bryla says we took sales away from them. We
12 caused their market share to shrink.

13 So, one of the very first questions I asked Mr. Bryla
14 on cross-examination, if we can go to trial transcript
15 page 565. I said, let's fill that chart out. Let's figure out
16 what belongs in that number because you didn't present that to
17 the jury, you just left it blank.

18 I said, okay, what were Reynolds' sale in 2013 of
19 Reynolds Wrap? I was expecting he was going to say they went
20 down \$8 million, that's the one point we lost to you guys in
21 market share. Instead, I said if we were to -- if we were to
22 just fill in the last full year that wasn't on what you put in
23 front of the jury, what would that be. About \$435 million.

24 Let's go back to the chart. \$435 million, a little
25 quick math, their sales didn't go down 8 million. Their sales

1 went up \$52 million. And at a 37-and-a-half percent profit, I
2 figure that's about an extra \$15 million plus.

3 So, the testimony under oath was Reynolds lost market
4 share, down 8 million. The truth is, they were up 52 million,
5 37-and-a-half percent of which was profit.

6 This goes exactly counter to what Mr. Lane tried to
7 testify to, which is that he said a second participant in this
8 market wrecks the market for everybody. The sales will go down
9 in the overall market when Handi-Foil comes in.

10 That's not the case at all. Handi-Foil had a good
11 sales year in 2013, they sold a lot of product. Reynolds had a
12 fantastic sales year in 2013. If you go back and you look at
13 this exhibit, you will see that's Reynolds' second best year of
14 aluminum foil sales ever. Their next -- their best year was
15 the year just before the recession.

16 So, Reynolds decided to compete in court instead of
17 in the marketplace. Why? Because our sales have gone up.
18 Theirs have gone up too.

19 What do they know about Handi-Foil though? They know
20 that Handi-Foil has nailed it in the pan business two different
21 times. The company that David's father, Nort, started went
22 from 0 percent in the pan market to 70 percent. They then sold
23 that business to Reynolds, which hasn't been able to run it as
24 well as Handi-Foil did. Right. They are back down to a very
25 minor player in that market again. Nort came back into the

1 instructions is about as painful as there is for a judge.

2 (Jury present.)

3 THE COURT: I apologize, I need you to go back into
4 the jury room for just one minute.

5 (Jury out.)

6 THE COURT: My fault. I forgot to ask you about
7 alternate jurors. We've got the two alternates. As I said, if
8 you both agree, they can sit and deliberate. If you would
9 prefer not -- if either party would prefer not, then I'll
10 excuse them after I read the instructions and ask them to, you
11 know, to not do anything which would disqualify them.

12 MR. FROEMMING: The more the merrier.

13 MR. CALLAHAN: Agreed.

14 THE COURT: Okay. All right, thanks.

15 (Jury present.)

16 THE COURT: I'm sorry, please be seated. And as I
17 said, I'm going to read them, because when I try and
18 paraphrase, I mess them all up.

19 Now that you've heard all the evidence that's to be
20 received in the trial and each of the arguments of counsel,
21 it's my duty to give you the final instructions as to the law
22 that's applicable in the case. These instructions should be
23 used to guide you in your decisions.

24 All the instructions of law given to you -- those
25 given in the beginning of the trial and those given to you

1 during the trial at different times and these final
2 instructions -- must guide you and govern your deliberations.
3 Actually, I don't remember giving you any instructions of the
4 law during the trial, but before we started and, and now.

5 It's your duty as jurors to follow the law as stated
6 in all the instructions and to apply these rules of law to the
7 facts as you find them to be from the evidence received during
8 the trial.

9 Counsel have quite properly referred to some of the
10 applicable rules of law in their closing arguments. If,
11 however, any differences appear to you between the law as
12 stated by counsel and as stated by the Court in these
13 instructions, you are to be governed by the instructions that
14 I'm giving you now.

15 You're not to single out any one instruction alone as
16 stating the law but must consider the instructions as a whole
17 in reaching your decisions.

18 Neither are you to be concerned with the wisdom of
19 any rule of law as I state. Regardless of any opinion you may
20 have as to what the law ought to be, it would be a violation of
21 your sworn duty to base any part of your verdict on any other
22 view or opinion on the law than that given in these
23 instructions, just as it would be a violation of your sworn
24 duty as judges to base your verdict upon anything but the
25 evidence that you received in the case.

1111

1 manufactured or sold by others, and to indicate the source of
2 his product, even if that source is generally unknown.

3 A trade dress is a type of trademark used by a person
4 to identify his product, to distinguish his product from those
5 manufactured or sold by others, and to indicate the source of
6 his product. The term "trade dress" refers to the total image
7 and overall appearance of a product, product packaging, product
8 label, product design, or a combination of these things. It
9 includes features such as size, shape, color or color
10 combinations, texture, graphics, or particular sales
11 techniques.

12 The purpose of trademark law is to prevent confusion
13 among consumers about the source of products and to permit
14 trademark and trade dress owners to show ownership of their
15 products and control their products' reputation.

16 Reynolds claims that Handi-Foil infringed Reynolds'
17 trademarks and trade dress for the design of the Reynolds Wrap
18 package by adopting the package designs Handi-Foil has used on
19 its packages of Handi-Foil brand aluminum roll foil.
20 Handi-Foil denies that its use of its trade dress on Handi-Foil
21 brand packages either infringes or causes a likelihood of
22 confusion.

23 Reynolds claims that Handi-Foil infringed Reynolds'
24 trademarks and trade dress. To succeed on these claims,
25 Reynolds must prove the following things by a preponderance of

1 the evidence:

2 One, that Reynolds owns trademarks and trade dress in
3 the Reynolds Wrap package as trademarks and trade dress;

4 Two, that Reynolds' trademarks and trade dress are
5 valid trademarks and trade dress;

6 Three, that Handi-Foil used its trade dress for the
7 Handi-Foil brand packages in interstate commerce in connection
8 with the sale or offering for sale of goods;

9 Handi-Foil used its trade dress for the Handi-Foil
10 brand packages in a manner that is likely to cause confusion as
11 to the source, origin, sponsorship, or approval of Handi-Foil's
12 products;

13 That Reynolds' claimed trade dress is not functional.

14 And I'll explain what I mean by these terms.

15 If you find that Reynolds has proved each of these
16 things by a preponderance of the evidence, you must find for
17 Reynolds. If Reynolds did not prove each of these things by a
18 preponderance of the evidence, you must find for Handi-Foil.

19 One of the things Reynolds must prove is that
20 Reynolds owns the Reynolds Wrap package design as trademarks
21 and common law trade dress.

22 Reynolds owns the Reynolds Wrap package design as
23 trademarks and trade dress if Reynolds used the trademarks and
24 trade dress in a manner that allowed consumers to identify the
25 trademarks and trade dress with Reynolds or its product before

1 Handi-Foil began to use the package designs for the Handi-Foil
2 brand packages on its aluminum roll foil boxes.

3 Among the factors you may consider are the volume of
4 sales of Reynolds' product, the nature of Reynolds' sales and
5 purchasers, and the amount of Reynolds' advertising promotion
6 and publicity relating to the product.

7 In this case, there's no dispute that Reynolds
8 received two registrations for the trademarks depicting certain
9 elements of the Reynolds Wrap package design, and these
10 registrations are now incontestable under the trademark laws.
11 This means that Reynolds' registrations of the trademarks are
12 conclusive evidence of Reynolds' ownership of these trademarks
13 and that the trademarks are valid and protectable.

14 A valid common law trade dress is a package design
15 that is distinctive, which means that the package design is
16 capable of distinguishing Reynolds' product from the products
17 of others. A trade dress is valid if it is inherently
18 distinctive or if it has acquired distinctiveness, and it is
19 nonfunctional.

20 An inherently distinctive common law trade dress is
21 one that consumers would almost automatically recognize as
22 identifying a particular brand or source of the product.

23 To determine whether Reynolds' common law trade dress
24 is inherently distinctive, you must consider it as a whole.
25 Some of the factors you may consider are:

1 Nine, the sophistication of the consuming public.

2 The weight to be given each of these factors is up to
3 you to determine. No particular factor or number of factors is
4 required to prove likelihood of confusion.

5 Virginia state requires -- state law requires a
6 finding of likelihood of confusion to prove trademark
7 infringement.

8 Virginia common law unfair competition claim requires
9 the same proof, including likelihood of confusion, as the
10 Lanham Act offenses.

11 Reynolds claims that Handi-Foil engaged in false
12 advertising. To succeed on this claim, Reynolds must prove
13 five things by a preponderance of the evidence:

14 First, Handi-Foil made a false statement of fact in a
15 commercial advertisement about the nature, quality, or
16 characteristic of its own product;

17 Second, that the statement actually deceived or had
18 the tendency to deceive a substantial segment of Handi-Foil's
19 audience;

20 Third, the deception was likely to influence the
21 purchasing decisions of consumers;

22 Four, Handi-Foil caused the false statement to enter
23 interstate commerce. A false statement enters interstate
24 commerce if Handi-Foil's products are advertised or sold across
25 state lines or if Reynolds' products as advertised or sold

1 MR. CALLAHAN: We agree with that, Your Honor.

2 THE COURT: All right. Then any reason why I should
3 not enter the verdict based on the judgment of the jury
4 pursuant to Rule 58 and then set some posttrial motions dates
5 and give you an opportunity to be heard posttrial?

6 I don't know if you want it. I mean, we would need
7 to talk about an injunction, obviously, on the equity side.
8 But if you want an opportunity to review the record and see
9 whether you want to file posttrial motions, I am certainly
10 willing to give you that time.

11 MR. FROEMMING: No reason, Your Honor.

12 THE COURT: Okay.

13 MR. CALLAHAN: That's fine with us, Your Honor. I
14 would point out that the test as to which the jury answered yes
15 to question 2 is the same test in the instructions as to which
16 they answered no to questions -- at least question 5.

17 THE COURT: Yeah.

18 MR. CALLAHAN: So -- but I think that can probably
19 get hacked out post in trial briefing.

20 THE COURT: Okay. Then why don't you get together on
21 a posttrial briefing schedule and set it down for a Friday, and
22 also the issue of the injunction, and we will hear you down the
23 road.

24 Obviously, a good time to try and resolve it now that
25 the jury has heard it. Very interesting from a judge's

1 would be terrific to give it a shot.

2 MR. FROEMMING: Thanks, Your Honor.

3 THE COURT: All right. Thank you. Thank you all.

4 MR. CALLAHAN: Thanks, Judge.

5 THE COURT: All right, we are in recess.

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7 TRIAL CONCLUDED
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I certify that the foregoing is a true and
accurate transcription of my stenographic notes.

21
22 /s/ Norman B. Linnell
23 Norman B. Linnell, RPR, CM, VCE, FCRR
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25